1976

Union Pacific Railroad Co. v. Intermountain Farmers Association, Inc. : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY, a corporation,

Plaintiff-Respondent,

vs.

Case No. 14635

INTERMOUNTAIN FARMERS ASSOCIATION, a corporation,

Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, HONORABLE JAMES S. SAWAYA, JUDGE

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Plaintiff-Respondent,	:	
vs.	:	Case No. 14635
INTERMOUNTAIN FARMERS ASSOCIATION, a corporation,	:	
Defendant-Appellant.	:	

STATEMENT OF CASE

As pointed out in the Stipulation of Facts (Tr. pages 88-124), this is a civil action brought by plaintiff-respondent, Union Pacific Railroad Company (hereinafter "Union Pacific"), seeking indemnification from defendant-appellant, Intermountain Farmers Association (hereinafter "Intermountain Farmers"), under one or more of the following theories (Tr. page 97):

1. Full indemnity under either contractual indemnity and/or implied indemnity;
2. Contribution under Section 78-27-39, U.C.A. 1953 (Supp. 1973);

3. Application of the doctrine of res ipsa loquitur.

Union Pacific accepts Intermountain Farmers' "DISPOSITION IN LOWER COURT" and "RELIEF SOUGHT ON APPEAL", but its "STATEMENT OF FACTS" is not complete. Therefore, Union Pacific submits the following supplemental "STATEMENT OF FACTS".

STATEMENT OF FACTS

As defendant states, this case was submitted to the trial court on stipulated facts. A copy of that stipulation, without exhibits, is attached hereto for the court's convenient reference.

Defendant's "STATEMENT OF FACTS" is deficient because it omits several pertinent portions of both the agreement between Union Pacific and Intermountain Farmers and the judgment rendered by Judge Sawaya. A complete statement of the pertinent contractual provisions is as follows (Tr. pages 7-8):

> Section 1. The Lessor, for and in consideration of the covenants and payments hereinafter mentioned to be performed and made by the Lessee, hereby agrees to lease and let and does hereby lease and let unto the Lessee. . . .
>
> Section 5. It is especially covenanted and agreed . . . that the Lessee shall at all times protect the Lessor and the leased premises from all injury,

damage or loss by reason of the occupation of the leased premises by the Lessee, or from any cause whatsoever growing out of said Lessee's use thereof.

Section 8. No building, platform or other structure shall be erected or maintained and no material or obstruction of any kind or character shall be placed, piled, stored, stacked or maintained closer than eight (8) feet six (6) inches to the center line of the nearest track of the Lessor; . . .

Section 11. The Lessee shall be liable for any and all injury or damage to persons or property, of whatsoever nature or kind, arising out of or contributed to by any breach in whole or in part of any covenant of this agreement. [Emphasis added.]

A complete statement of the pertinent provisions of Judge Sawaya's Conclusions of Law is as follows (Tr. page 155):

1. The written Lease Agreement between plaintiff and defendant requires defendant to indemnify plaintiff for any and all injuries that were sustained by Richard V. Richins, an employee of the plaintiff, on October 31, 1972, while performing his employment duties on railroad trackage immediately adjacent to the premises covered by the subject Lease.

2. The Court further concludes that the negligence of either party is not an issue nor a necessary element to the conclusion of this action.

3. Plaintiff is entitled to judgment against defendant in the sum of $165,632.50, together with interest at 6% per annum pursuant to Section 15-1-1, U.C.A. 1953, from and after October 31, 1973, to date hereof, and together with costs and disbursements herein incurred in the amount of $25.20.

POINT I

THE INJURIES SUSTAINED BY MR. RICHINS ON OCTOBER 31, 1972, WERE NOT CAUSED, IN WHOLE OR IN PART, BY ANY NEGLIGENCE OF UNION PACIFIC.

On page 22 of its brief, Intermountain Farmers contends that Union Pacific's brakeman, Levi Ki Tua'one, negligently failed to maintain a proper lookout during the westbound train movement along the Poultry Track adjacent to Intermountain Farmers' facility. Intermountain Farmers fails to point out, however, that there was fresh snow on the ground at the time (Stipulation, ¶ 7); that it was dark (Stipulation, ¶ 7); and that although Mr. Tua'one was maintaining a lookout he did not observe any obstacle to the movement of the train (Stipulation, ¶ 16).

In this regard, Mr. Tua'one testified that as the train proceeded in a westbound direction onto the spur track serving Intermountain Farmers "everything was covered with snow" (Deposition page 7, line 17; see also deposition page 6, lines 22-23). The photographs attached to the Stipulation of Facts as Exhibits "D", "E", "F", "G", "H", and "I" which were secured the morning following Mr. Richins' accident reasonably depict the conditions prevailing at the time of the accident. Mr. Tua'one also testified that he did not see the spool of cable prior to the accident (Deposition page

9, lines 13-15) and in retrospect believes that this was solely due to the snow (Deposition page 9, lines 23-25; page 10, lines 2-6; page 32, lines 22-25; page 33, lines 1-3).

In short, there is no factual basis whatsoever to even infer that Mr. Tua'one or Union Pacific was negligent or that either failed to act in a reasonable and prudent manner under all of the circumstances.

POINT II

ASSUMING, ARGUENDO, UNION PACIFIC HAD BEEN NEGLIGENT, WHICH NEGLIGENCE UNION PACIFIC EXPRESSLY DENIES, SUCH NEGLIGENCE WOULD BE IRRELEVANT TO THE ISSUES IN THIS CASE.

A. Applicable sections of the agreement between Intermountain Farmers and Union Pacific make the question of negligence irrelevant.

Section 11 of the agreement between Intermountain Farmers and Union Pacific requires Intermountain Farmers to indemnify Union Pacific for any injuries to persons "arising out of or contributed to by any breach in whole or in part" of any covenant of the subject agreement, and Section 8 of the agreement prohibits the placement or maintenance of any material or obstruction within eight feet six inches of the center line of the track on which Richins' accident occurred.

It is undisputed that at the time Mr. Richins sustained his injury, the spool of cable which his foot hit[1] was located within the proscribed clearance zone (Stipulation, ¶ 26). Consequently, it is clear that the provisions of Section 8 of the agreement were breached by the mere existence of the spool of cable within the proscribed clearance zone and that Union Pacific is entitled to full indemnity in accordance with the provisions of Section 11 of the agreement.

Furthermore, it is also clear that Intermountain Farmers owned the spool of cable (Stipulation, ¶¶ 5, 25, and 28) and maintained it upon the leased premises (Stipulation, ¶ 29). Consequently, it is clear that Mr. Richins' injuries were sustained as a direct result of Intermountain Farmers' use and occupation of the leased premises, thus providing Union Pacific with a second independent basis for contractual indemnification under the provisions of Sections 5 and 11 of the agreement.

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[1] See the following excerpt from page 18 of Intermountain Farmers' brief on appeal

> As the train commenced moving out of the yard, a portion of the engine apparently again passed near the spool where the leg of the conductor, Richins, evidently, in some manner, came in contact with the spool, causing him to fall to the ground resulting in severe injuries to his right leg.

and the first full paragraph of page 4 of defendant's Trial Memorandum (Tr. page 72).

B. Under applicable case law the question of negligence is irrelevant.

In Minneapolis-Moline Co. v. Chicago, M., ST. P. & P. R. Co., 199 F.2d 725 (8th Cir. 1952), the railroad sought contractual indemnity, under clauses similar to those in issue here, from an industry in a situation where one of the industry's employees had been injured when a train struck a metal box located within the proscribed minimum clearance requirements of the industry track contract. The court, in holding that the railroad was entitled to recover full indemnity from the industry, ruled (1) that the railroad, in making the contract covering property located on its right of way, acted in a private capacity and not as a common carrier and, consequently, could exact its own conditions as to occupancy; (2) that the industry's obligation to keep the tracks unobstructed was absolute and unqualified; (3) that the industry's liability doesn't depend upon negligence or tort but that such liability arises from breach of contract; and (4) that the industry could have made negligence a condition of liability but since it didn't it would not be heard to complain of the choice it made. With particular application to the present case is the statement of the court at page 731:

> The Railroad Company's cause of action against the Moline Company, however, is not primarily based upon tort, nor is it dependent upon negligence. The liability of the Moline Company arises from

its breach of this indemnity provision of the contract. The rule as to proximate cause is not available to the Moline Company because by its contract it agreed to indemnify against loss "from and against any and all damages, remote as well as proximate, in any wise resulting from any non-performance or non-observance of the foregoing covenant concerning lateral distance or perpendicular height, for which the Railway Company shall become, in whole or in part, liable or be charged." The jury, in answer to an interrogatory proposed by appellant, found that plaintiff's injuries resulted in whole or in part from "the presence of the trash box within six feet laterally at right angles from the nearer rail of track 4." It thus appears that the damages from which the appellant agreed to hold the Railroad Company harmless need not have been caused solely by any negligence on its part, nor was the act of the Moline Company required to be the proximate cause of the loss. A liability resulted even though such act were the remote cause.

The case of John P. Gorman Coal Co. v. Louisville & N. R. Co., 213 Ky. 551, 281 S.W. 487, is strikingly similar in its facts to the case at bar. In that case the Coal Company agreed to maintain and keep the tracks free from obstructions and to hold the Railroad harmless on account of any loss arising from a violation of the provision. In the course of the opinion it is said:

> "The obligation to keep the tracks free from obstruction, and to hold the appellee harmless from any claims on account of any failure on appellant's part to so keep the tracks, is an absolute one. Appellant might have made it a condition of liability that it should be guilty of some negligence, but

> this it did not do. It was free to make any contract it chose so long as it was not against public policy, and, having chosen to undertake an absolute liability rather than a qualified one, it cannot now be heard to complain of the choice it made." [Emphasis added.]

In Northern P. Ry. Co. v. National Cylinder G. Div. of C.C., 467 P.2d 884 (Wash. 1970), the railroad was awarded full contractual indemnity from a rail welding contractor for injuries sustained by a railroad employee whose leg was crushed by a moving rail. The court took special note of the fact that the agreement was silent on the question of whether the negligence of either party was relevant to the obligation of the industry to indemnify the railroad and concluded that causation rather than negligence controlled. In this regard, the court states at pages 887-88:

> The trial court commented in its oral opinion it was significant the agreement at no point mentioned the word "negligent" or any concept of fault. It noted the language used concerned itself solely with the occurrence of an incident which would later give rise to a claim or lawsuit. . . .
>
> The trial court concluded the agreement was a clear undertaking based upon causation rather than negligence or fault and had the intention of the parties been otherwise, they could clearly and simply have provided in the agreement that the obligation to indemnify would be subject to fault on the part of National in

> connection with some phase of the welding operation. . . .
>
> National argues that inasmuch as the trial court did not find negligence on its part, it cannot be required to indemnify Northern Pacific. Under the terms of the indemnity provision of the contract, the trial court's finding that National's activities caused the injuries out of which the claim arose is sufficient to establish liability. . . .

See also Louisiana & Arkansas Railway Co. v. Anthony, 199 F.Supp 286 (W.D. Ark. 1961), aff'd 316 F.2d 858 (8th Cir. 1963), cert. denied 375 U.S. 830 (1963).

In Missouri Pacific R. Co. v. Rental Storage & T. Co., 524 S.W.2d 898 (Mo. 1975), the railroad company sought contractual indemnity from an industry pursuant to the provisions of a spur track agreement for $63,500, which it had paid to an employee's widow under the provisions of the Federal Employers' Liability Act. During a switching movement over this spur, the widow's decedent had been caught and crushed to death between a boxcar and a loading dock. The contract, in relevant part, required the industry to indemnify the railroad for any liability, claims or losses which were "in any manner caused by, arising out of or connected with" its covenant to maintain proper, horizontal clearances between the center line of the spur track and any buildings, structures, fixtures, materials or obstructions. 524 S.W.2d

at 902. The trial court awarded judgment to the railroad and the industry appealed, claiming that the railroad had failed to establish that the railroad's liability accrued as a direct and proximate cause of the industry's breach of the close clearance covenant. In this regard, there was evidence that the industry's lessee may have been the party directly responsible for the close clearance impairment. The Missouri Court of Appeals first expressly rejected any suggestion that common law tort concepts of proximate cause were applicable, 524 S.W.2d at 910, and then held that the "arising out of or connected with" language of the contract controlled. 524 S.W.2d at 909-10.

It is significant to note that the provisions of Sections 1, 5, 8, and 11 of the agreement between Intermountain Farmers and Union Pacific do not mention the concept of negligence and/or fault. Section 11 provides that Intermountain Farmers shall be liable for any and all injury to any person "arising out of or contributed to by any breach in whole or in part of any covenant of this agreement". This language is completely free from any ambiguity and is as absolute in its terms as is the language in Section 8 wherein Intermountain Farmers covenanted not to place, pile, store, stack or maintain any material or obstruction of any kind or character closer than eight feet six inches to the center line of the nearest Union Pacific track. Based upon

this language and the authorities discussed above, Union Pacific clearly is entitled to full indemnification from Intermountain Farmers.

C. Even if Union Pacific were negligent in the manner claimed by Intermountain Farmers, which negligence Union Pacific expressly denies, such negligence would not be sufficient to bar Union Pacific's recovery.

As in the instant case, the industry in Missouri Pacific, supra, also claimed that the railroad was not entitled to indemnification under the contract because it was guilty of contributory negligence. The industry phrased this contention in terms of "knowing acquiescence" by the switch crew, of which the widow's decedent was a member, in continuing operations in the face of the open and obvious hazard presented by the material which was stacked in violation of the close clearance covenant in the contract. The court rejected this defense on several grounds. First, it noted that the defense is strictly limited when the right to indemnity arises ex contractu as was the situation in the case before it. The court went on, however, to analyze this defense as if plaintiff's action was premised on implied rather than contractual indemnity. The court noted that essentially two elements are necessary in order for the defense to be successfully asserted. First, it must be established that the rail-

road had long, continued awareness of the dangerous condition and had completely failed to take any corrective action or to request the industry to do so. Secondly, it must also be established that the railroad's conduct was so seriously wrong that it would be inequitable to order full restitution. The court then stated that "Something more than imputed legal knowledge of a temporary, though dangerous condition is required, and that is all the evidence suggests here." 524 S.W.2d at 911.

In the instant case, the record indicates that the spool of cable had not been observed in the vicinity of the track on the day prior to Richins' accident (Stipulation, ¶ 29); that Richins' accident occurred at night under poor lighting conditions (Stipulation, ¶ 7); and that the area in question was covered with fresh snow (Stipulation, ¶ 7). Consequently, even if Intermountain Farmers' argument that Union Pacific is barred from seeking indemnity because of Mr. Tua'one's failure to detect the spool of cable in time to prevent Mr. Richins' injury was relevant in the face of the contractual provisions involved here, it is clear from the foregoing that such evidence would not be sufficient to bar Union Pacific's action for indemnity.

Based upon the foregoing, Union Pacific is clearly entitled, under the facts in this case, to recover full indemnity from Intermountain Farmers.

POINT III

UNION PACIFIC IS NOT SEEKING RECOVERY FOR ITS OWN NEGLIGENCE IN THIS ACTION BUT, RATHER, IS SEEKING RECOVERY FOR LIABILITY WHICH WAS VICARIOUSLY IMPOSED UPON IT BY THE FEDERAL EMPLOYERS' LIABILITY ACT FOR THE BREACH OF A CONTRACTUAL DUTY OWED IT BY INTERMOUNTAIN FARMERS.

Under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq., a railroad has a nondelegable duty to furnish its employees with a safe place in which to work, regardless of whether or not it has actual control over the premises upon which the injury occurred.[2] A railroad is liable under this Act for injuries to its employees which are caused, in whole or in part, by any negligence, no matter how slight, upon the part of the railroad or the injured employee's co-workers. Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508 (1956). A railroad is precluded from delegating its responsibilities under the Act to a third party; however, it can indemnify itself through a contract such that a third party may be required to satisfy

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[2] For an excellent discussion of this point in a case quite similar to the one at bar, see Missouri Pacific R. Co. v. Rental Storage & T. Co., supra.

the railroad's statutory obligation by compensating the injured employee for his injury. Scherff v. Missouri-Kansas-Texas Railroad Co., 449 F.2d 23 (5th Cir. 1971); Beachboard v. Southern Railway Company, 193 S.E.2d 577 (N.C. 1972); Inland Container Corp. v. Atlantic Coast Line R. Co., 266 F.2d 857 (5th Cir. 1959).

Even though the subject agreement does not mention the provisions of the Federal Employers' Liability Act, Intermountain Farmers is still held to have known of the existence of this federal statute at the time it executed the subject agreement. Oregon Short Line R. Co. v. Idaho Stockyards Co., 12 Utah 2d 205, 364 P.2d 826 (1961); Southern Pacific Transportation Co. v. Nielsen, 448 F.2d 121 (10th Cir. 1971). Furthermore, a railroad may be guilty of passive negligence and therefore liable to its employee under the Federal Employers' Liability Act and still recover full indemnity from the industry. Louisiana & Arkansas Railway Co. v. Anthony, supra; Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950). See also Missouri Pacific R. Co. v. Rental Storage and T. Co., supra.

In the Anthony case, supra, the railroad sought contractual indemnity from a shipper under a spur track agreement for the amount paid by the railroad to one of its employees under the provisions of the Federal Employers' Liability Act for injuries which he had sustained when he

struck the overhang of a moveable shed which had been placed in close proximity to the spur track in violation of the close clearance provision of the spur track agreement. The court, in holding that the railroad was entitled to full indemnity, stated on pages 298-99:

> The railway company can be guilty of passive negligence and therefore liable to the claimant under its non-delegable duties as set forth in the F.E.L.A. and still recover full indemnity from the industry. (Citations omitted)
>
> The question of liability of the industry in such cases is to be determined from the indemnity contract and the parties' negligence is to be determined on the basis of the F.E.L.A., 45 U.S.C.A. § 51 et seq., not common law negligence. (Citations omitted)
>
> . . .
>
> This is a case, then, in which the defendant industry was actively negligent in creating and not correcting the unsafe condition adjoining the spur track which caused the accident, while the plaintiff's only negligence consisted of the defendants' negligence vicariously imputed to it by virtue of its nondelegable duty to its employee, . . . to provide him with a safe place to work.

Accord, Baltimore and Ohio R. Co. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955).

In the landmark Booth-Kelly case, supra, the railroad sought contractual indemnity from the industry for the full amount paid to an employee under the provisions of the

Federal Employers' Liability Act for injuries sustained by the employee when he struck a wood cart left by the industry within 42 inches of the nearest rail. The trial court awarded the railroad only one-half of the claimed amount and both parties appealed. The Ninth Circuit Court of Appeals remanded the case with directions to award the railroad full indemnity under the spur track agreement. The court differentiated between "active" and "passive" negligence, concluding that the industry was actively negligent in placing and leaving the cart within 42 inches from the track and that the railroad was passively negligent because of its failure "to make safe a dangerous condition of land or chattels, which was created by the misconduct of another, i.e., of Booth-Kelly." 183 F.2d at 911. The court further remarked that "Southern Pacific seeks indemnity not for its own negligence, but rather for that of Booth-Kelly." Id. at 912. In discussing Southern Pacific's negligence, the court stated:

> Basic in any determination of the meaning of this whole paragraph is an understanding that when the parties contemplated that there might be claims for indemnity they must have been cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, for otherwise no judgment could have been recovered from him. That this is typically true is recognized in the comment under Section 95, Restatement

> on Restitution, as follows: "In all of these situations the payor is not barred by the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned; in most of the cases it is because of this failure that he is liable . . . . 183 F.2d at 907.

The Utah courts have recognized this distinction between "active" and "passive" negligence in a number of different cases. Salt Lake City v. Schubach, 108 Utah 266, 159 P.2d 149 (1945); Holmstead v. Abbott G.M. Diesel, Inc., 27 Utah 2d 109, 493 P.2d 625 (1972); and Barr v. Brezina Construction Co., 464 F.2d 1141 (10th Cir. 1972), cert. denied 409 U.S. 1125 (1973).

In Gollick v. New York Central Railroad Company, 138 F.Supp. 384 (E.D. Mich. 1956), the railroad sought contractual indemnity from the industry for the amount which it had paid to an employee pursuant to the provisions of the Federal Employers' Liability Act. The railroad company employee was knocked off the side of a boxcar upon which he was riding when his body contacted a steel "I" beam located perpendicularly between two sets of tracks running into the industry's plant. The "I" beam was a part of the brace for a special door installed by the industry. When the door was opened it was necessary to separately remove the "I" beam and slide it to the side so that there would be sufficient clearance for railroad switching operations. This

accident happened at night after the industry employees had left the plant. The court concluded from the evidence that the door in question was opened by railroad employees who failed to remove the "I" beam. Even though the specific contractual indemnification language in question did not provide for the railroad to be indemnified for its own negligence, the court held that the railroad was entitled to full indemnification in the following language:

> We pass to the question of whether or not the contract intended to include indemnity of the Railroad Company where the accident was caused in part by negligence of its own employees. Paragraph Third of the indemnity contract, after providing that the Industry shall not place nor allow any temporary or permanent structure or obstruction within six feet laterally of the tracks then said:
>
> > "The industry shall indemnify, and hold harmless, the Railroad Company from any and all liability for loss of life or damage or injury to property or persons (including employees and property of either of the parties hereto), arising by reason of, or which in any way results from, the existence or maintenance of structures or obstructions at clearances less than standard (six feet) * * * " . . .
>
> The Industry "maintained" the "I" beam and in view of the language above quoted it is clear that the intent of the parties was that if the obstruction in any way contributed to the injury, the Industry was to indemnify the Railroad Company therefor without regard to the latter's negligence. . . .

. . .

> In the case at bar Gollick's injuries, regardless of whether they were contributed to by the train crew's failure to remove the "I" beam, were also caused by the Industry's negligent violation of its contract, to-wit: maintenance of a structure closer than six feet laterally to the tracks. Under the contract it was the Industry's duty to see that the "I" beam was removed. Having failed to do so renders the Industry liable. 138 F.Supp. at 387-88.

Union Pacific's liability to Mr. Richins arose solely by virtue of its nondelegable duty under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq. (Stipulation, ¶¶ 33, 39, and 40), to provide him with a safe place in which to work. The property where the accident occurred was under the complete control of Intermountain Farmers. The spool of cable was owned and maintained on the property by Intermountain Farmers. Clearly, the accident occurred because Intermountain Farmers failed to comply with the close clearance covenant in the agreement. It is this failure on Intermountain Farmers' part for which Union Pacific was vicariously liable to Mr. Richins under the Federal Employers' Liability Act. Therefore, Union Pacific's negligence, if any, under the circumstances, was at most passive or derivative in character. Consequently, Union Pacific is entitled to recover full indemnification from Intermountain Farmers.

POINT IV

THE CASES AND AUTHORITIES CITED BY INTERMOUNTAIN FARMERS IN ITS BRIEF ARE NOT IN POINT AND ARE NOT RESPONSIVE TO THE LEGAL AND/OR FACTUAL ISSUES PRESENTED IN THIS CASE.

Intermountain Farmers' brief relies extensively on this court's decision in Union Pacific Railroad Co. v. El Paso Natural Gas Co., 17 Utah 2d 255, 408 P.2d 910 (1965). In that case, the railroad sought indemnity under the provisions of an agreement providing for the construction and maintenance of a pipeline for damages paid to an El Paso employee who sustained personal injuries in an accident which occurred at a railroad crossing located one and one-half miles from the pipeline covered by the subject agreement. The railroad admitted that it was negligent but sought indemnity under a general indemnity clause, arguing that "but for" the existence of the pipeline to which the El Paso employee was traveling at the time he sustained injury the railroad crossing accident would not have occurred. This court rejected this "but for" argument in the following language:

> The fair import of the entire provision, considered together in context as it should be, is that the damages guaranteed

> against should have at least some causal connection with the construction, existence, maintenance or operation of the pipeline other than an incident which happened merely coincidental to its existence. 408 P.2d at 914.

The court concluded that the occurrence of the crossing accident was an unforeseen and unrelated event which was not within the contemplation of the parties at the time the pipeline agreement was executed. Clearly, this was not the situation in the case at bar.

Intermountain Farmers also cites the Utah cases of Jankele v. Texas, 88 Utah 325, 54 P.2d 425 (1936); Walker Bank & Trust Co. v. First Security Corp., 9 Utah 2d 215, 341 P.2d 944 (1959); Barrus v. Wilkinson, 16 Utah 2d 204, 398 P.2d 207 (1965); and Howe Rents Corporation v. Worthen, 18 Utah 2d 263, 420 P.2d 848 (1966), in support of its position on appeal, none of which is relevant to the facts or legal issues in this case.

In the Jankele case, supra, the plaintiffs entered into an agreement with the defendant oil company for the installation by the oil company of certain gasoline pumps and tanks on property owned by the plaintiffs. Plaintiffs further agreed to purchase the oil and gas which they intended to sell to the public at this location from the defendant. The defendant negligently installed one of the tanks such that a joint on the line leading from the tank to the pump

could not withstand normal settling of the tank and ruptured. During a period of approximately four months, over 3,000 gallons of gasoline with a value of $615 were lost through this ruptured joint. The plaintiff sued the defendant for the value of this gasoline pursuant to the agreement between the parties which contained the following language:

> The dealer shall * * * at his expense keep said equipment in good order and repair; * * * exonerate the company and hold it harmless from all claims, suits and liabilities of every character whatsoever and howsoever arising from the existence or use of said equipment. 54 P.2d at 426.

The defendant asserted this clause as a complete defense to the plaintiff's claims. The trial court entered judgment for the plaintiff and the Supreme Court of Utah affirmed. The crux of the matter in the court's view was whether or not the quoted language exempted the defendant from liability for negligent installation of the equipment. The court determined that the foregoing language manifestly did not on its face exempt the defendant from such liability. The court admittedly indicated that there was some question as to whether or not the defendant could relieve itself by contract from its own negligence, but it did not squarely address the issue other than to indicate that there were situations where a party could do so. The court felt that it was not necessary to decide this question because the contract only

sought to exonerate the defendant for liabilities "arising from the existence or use of said equipment" and not from liabilities incurred in installing the equipment.

In the instant case, the contract clearly covers the liability over which Union Pacific brought suit. In addition, there is no evidence of negligence on Union Pacific's part. Even assuming that Mr. Tua'one's conduct was negligent, which negligence Union Pacific expressly denies, such negligence could not be construed to be more than passive in nature and this could not serve to bar Union Pacific's action for indemnification.

In the Walker Bank case, supra, the defendant's predecessor in interest, Commercial Bank, had failed to pay the premiums on a life insurance policy upon the life of one Nancy Galligher in accordance with an authorization furnished by her. Walker Bank, as the guardian of her children, sought and recovered a judgment from the defendant in the amount of the insurance policy. The decedent had signed a "sight draft authorization" which authorized the Commercial Bank to charge her account on a monthly basis with the drafts which were to be drawn by her insurance company. At some point in time the bank lost the authorization and started to return the monthly sight drafts to the insurance company with a notation "not authorized"; however, the bank never notified the decedent of this action. The authorization

which the decedent signed also contained an indemnification clause which required the decedent to hold the bank harmless for any liability resulting from its compliance with the authorization. This court in affirming the trial court's award of judgment to the plaintiff stated that this language

> purports only to protect the bank from liability arising from its compliance with the authorization, . . . It is likewise not unreasonable to assume that what the bank was being protected for was a debiting of the account for the amount drawn; and that the drawer of the drafts might draw for too much money, or too many drafts, or that some other such mistake might occur for which it did not want to be responsible. But there is no provision that it would be protected in the event of entire failure to fulfill the arrangement. 341 P.2d at 947.

Clearly, if the court had not interpreted the clause in this fashion there would have been a complete failure of consideration for the agreement between the decedent and the bank. Obviously, the decedent had to keep money on account with the bank in order for the authorization to be honored. On the other hand, the fact that the bank offered this service undoubtedly acted as an inducement to the decedent to keep her funds on account with the bank. If the bank could, at any time, arbitrarily and unilaterally cease paying the insurance premiums without notifying the depositor of this action, the agreement signed by the decedent would have no value whatsoever.

In the instant case, Union Pacific leased certain land to Intermountain Farmers. Although Intermountain Farmers thereby acquired complete control and dominion over the leased premises, Union Pacific employees were still required to work on or about said premises. As partial consideration for the execution of this agreement, Intermountain Farmers expressly and explicitly agreed to keep an area eight feet six inches on either side of the center line of this track clear of any obstructions or obstacles of any kind or nature whatsoever. Further, Intermountain Farmers agreed to assume complete liability for any injury to any person as a result of its failure to keep this area free of obstructions. Intermountain Farmers did not keep the area free from obstructions and Mr. Richins was seriously injured as a direct consequence thereof. Clearly, his injury resulted as a direct and proximate cause of Intermountain Farmers' failure to comply with the affirmative action requirements of the close clearance covenant. If Intermountain Farmers is not held responsible for the injury to Mr. Richins, a significant failure of consideration would result and the clear intent of the parties would be abrogated.

In the Barrus case, supra, an employee of an insurance company which had leased a portion of a building for office space slipped and fell in a common hallway in that building. She sued the landlords for damages and they, in

turn, impleaded the insurance company, seeking indemnification under the terms of an indemnification clause contained in the lease. This clause provided in relevant part that the landlords would be liable to the employees of the tenant insurance company for any injuries inflicted upon them as a result of the negligence of the landlords. The insurance company, on the other hand, agreed to indemnify the landlords for any damage or liability resulting to the landlords from the injury to any person which was caused by an act of the insurance company or any of its officers, agents or employees. The trial court granted the insurance company's motion to dismiss and the Supreme Court of Utah affirmed, pointing out that the clause in question expressly made the landlords responsible for their own negligent acts.

Unlike the landlords in the Barrus case, Union Pacific is not seeking indemnification under a contract where it is expressly responsible for its own negligence. Moreover, due to the provisions of the FELA, Union Pacific, unlike the landlords, was liable to the injured person even though its negligence, if any, was merely derivative rather than active in a traditional common law sense. Consequently, it seems clear that the Barrus case actually supports Union Pacific's position.

In the Howe Rents case, supra, a bailor sued a bailee for damages to a cement mixer which allegedly had been

negligently attached to the bailee's truck by the bailor. The cement mixer came loose and overturned. The bailor sued for damages under a portion of the contract of bailment which rendered the bailee liable for all damage to equipment regardless of cause. The trial court refused to allow the defendant to prove that the accident was caused by the negligent acts of the bailor. This court reversed with instructions to allow the defendant to assert the bailor's negligence as a defense.

In the instant case, there is no evidence of negligence on Union Pacific's part. Even assuming that Mr. Tua'one's failure to detect the spool of cable prior to the accident constituted negligence, which negligence is expressly denied, such negligence would at best be passive rather than active, a distinction recognized by the court in Barrus, which case was heavily relied upon by the court in Howe Rents. Moreover, Intermountain Farmers failed to perform a duty which it had specifically covenanted to perform, i.e., keep an area eight feet six inches wide from the center line of the track free of any obstacles or other material, which failure directly and proximately caused Mr. Richins' injuries. Furthermore, the contract in the instant case clearly, unequivocally, and in absolute terms spells out Intermountain Farmers' obligation if it fails to comply with the covenant. Together, Sections 11 and 8 simply state that if Intermountain Farmers

allows anything to get within eight feet six inches of the center of the track and someone is hurt as a result thereof, Intermountain Farmers is solely responsible therefor.

It must be emphasized that in each of the foregoing cases relied upon by Intermountain Farmers the negligence of the indemnitee was either admitted or conclusively established. Furthermore, none of the foregoing cases involves the special relationship which exists between an interstate railroad and its employees under the Federal Employers' Liability Act nor do any of them involve a contract between such a railroad and an industry whereby the railroad sought to protect itself from liability which may accrue to it while employees are performing work on land which is under the domination and control of the industry. The relationship between a railroad and its employees under the Federal Employers' Liability Act is unique. The threshold of negligence which an employee must establish in order to recover is extremely low and is quite different from the normal threshold of negligence which prevails at common law. Moreover, the Federal Employers' Liability Act provides for pure comparative negligence--a situation which exists in very few other areas of the law. Finally, and probably most significant, none of the cases cited by Intermountain Farmers distinguishes between the concept of liability for breach of covenant as opposed to liability for tort. For all of these

reasons, the Utah cases relied upon by Intermountain Farmers are completely inappropriate.

Intermountain Farmers cites a portion of 41 Am. Jur. 2d Indemnity § 15 on pages 21-22 of its brief on appeal; however, the portion of said section which pertains to this lawsuit and which was omitted by Intermountain Farmers in its brief further provides as follows:

> It has been said that the general rule is not necessarily designed to frustrate coverage of the indemnity clause as against losses partially attributable to negligence of the indemnitee; rather, the rule is commonly stated in support of conclusions against coverage in cases where the precise nature of the relationship between the indemnitee's negligence and the particular loss or claim is such as to negate any intent that the parties designed to cover it by their agreement of indemnification. 41 Am. Jur. 2d Indemnity § 15, pages 700-01.

Furthermore, Intermountain Farmers cites 19 A.L.R. 3d 936 on page 27 of its brief on appeal but fails to note the following qualifying language appearing at the beginning of the annotation at 19 A.L.R. 3d 930:

> Excluded from this annotation are those cases in which indemnity or contribution is sought upon the basis of an express contract providing for indemnity or contribution between the joint tortfeasors.

Finally, Intermountain Farmers quotes extensively from Chicago & Illinois Midland Ry. Co. v. Evans Const. Co.,

208 N.E.2d 573 (Ill. 1965), an implied indemnity case which does not address the concept of contractual indemnity at all. The same infirmity applies to the case of Union Stock Yds. Co. v. Chicago &c. R.R. Co., 196 U.S. 217 (1905), cited in the Chicago & Illinois Midland Ry. Co. case. Consequently, the legal principles and the holdings of the Chicago & Illinois Midland Ry. Co. case and the Union Stock Yds. Co. case have absolutely no application to the trial court's decision in the instant case.

CONCLUSION

There is no factual or legal basis whatsoever upon which to sustain a claim that Union Pacific, its agents or employees were in any manner negligent or that such negligence caused Mr. Richins' injuries. Even if Union Pacific were in fact negligent in some manner, which Union Pacific expressly denies, the trial court correctly ruled that "the negligence of either party is not an issue nor a necessary element to the conclusion of this action" because Intermountain Farmers' liability is clearly founded upon breach of covenant rather than tort liability.

The language of the lease agreement prohibited any obstruction within the clearance zone regardless of negligence on the part of either party. Since the spool of cable which caused Mr. Richins' injuries was owned by Inter-

mountain Farmers and was located within the area expressly prohibited by Section 8 of the subject agreement. Mr. Richins' injuries were the direct result of Intermountain Farmers' breach of the close clearance covenant. Section 8 of the agreement imposed an absolute responsibility upon Intermountain Farmers to keep the specified clearance zone free from obstruction regardless of the identity of the person(s) responsible for placing, piling, storing, stacking or maintaining the obstruction. Moreover, none of the pertinent provisions of the lease (Sections 1, 5, 8, and 11) mentions the words "negligence" or "fault" but, rather, imposes liability upon Intermountain Farmers for the breach of any covenant, regardless of the question of negligence.

Union Pacific's liability to Mr. Richins arose solely by virtue of its nondelegable duty to provide a safe place to work under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, et seq., which vicariously imputed Intermountain Farmers' negligence to it. Since Union Pacific's negligence in this regard was derivative or, at most, passive in character, it is, under the cases and authorities discussed above, clearly entitled to recover full indemnification from Intermountain Farmers.

Finally, the cases and authorities cited by Intermountain Farmers are not in point and involve factual situations which are vastly different from the instant case.

Intermountain Farmers has not cited one case involving a suit by a railroad against an industry for contractual indemnification for damages paid to an employee under the Federal Employers' Liability Act in support of its position. To the contrary, the overwhelming weight of authority in such situations completely supports the trial court's decision.

Based upon the foregoing, Union Pacific respectfully requests that the decision of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on this 29th day of November, 1976, I served by mailing, postage prepaid, a true and correct copy of the foregoing Brief of Plaintiff-Respondent to F. Robert Bayle, Esq., and Wallace R. Lauchnor, Esq., attorneys for defendant-appellant, 1105 Continental Bank Building, Salt Lake City, Utah 84101.

APPENDIX A

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

UNION PACIFIC RAILROAD COMPANY, a corporation, Plaintiff, -vs- INTERMOUNTAIN FARMERS ASSOCIATION, a corporation, Defendant.	STIPULATION OF FACTS Civil No. 215754

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the above case be submitted to the Court for ruling without a jury, based upon the following stipulated facts:

1. Union Pacific Railroad Company is now, and has been at all times material hereto, a corporation organized and existing under the laws of the State of Utah, operating a railroad system in the State of Utah and in surrounding states.

2. Intermountain Farmers Association is now, and has been at all times material hereto, a corporation organized and existing under the laws of the State of Utah.

3. On February 6, 1964, plaintiff and its lessor, Los Angeles & Salt Lake Railroad Company, entered into a written agreement with defendant (hereinafter referred to as "Subject Agreement"), a copy of which is attached hereto, marked Exhibit "A", and by this reference made a part hereof, that provides in general for the leasing of certain property (hereinafter referred to as the "Leased Premises"), at Draper, Salt Lake County, Utah, for a warehouse, grainery, cold storage, platform, and driveway site.

4. Pursuant to an extension rider dated October 9, 1968, a copy of which is attached hereto, marked Exhibit "B", and by this reference made a part hereof, and an addendum, dated December 31, 1970, a copy of which is attached hereto, marked Exhibit "C", and by this reference made a part hereof, the terms and conditions of the Subject Agreement were in full force and effect to and including November 30, 1973.

5. At approximately 7:00 o'clock p.m., on October 31, 1972, at a time when the Subject Agreement was in full force and effect, and while plaintiff's employees were performing a switching operation on the railroad track immediately adjacent to the Leased Premises, one Richard V. Richins, conductor in charge and an employee of plaintiff, sustained severe and permanent injuries. Richins claims that he sustained such injuries when knocked from the second locomotive unit of a two-unit diesel engine upon which he was riding by a spool of cable owned by Intermountain Farmers, said spool of cable being located on the Leased Premises in a position closer than eight (8) feet six (6) inches to the center line of the nearest track of the plaintiff.

6. At the time Richins sustained said injuries, plaintiff was engaged as a common carrier in interstate commerce; Richins was employed by plaintiff in such commerce; and Richins' said injuries occurred in the scope and course of his employment for plaintiff.

7. At the time Richins sustained his injuries, it was dark and it had just recently stopped snowing. There was some snow on the ground, as evidenced by the photographs secured on the morning following the accident and attached hereto as Exhibits "D", "E", "F", "G", "H" and "I", and by this reference made a part hereof. In addition, attached hereto as Exhibit "J", and by this reference made a part hereof, is a copy of a Local

Climatological Data Report showing weather conditions and precipitation levels recorded at the Salt Lake International Airport during the month of October 1972. The scene of the accident is approximately 18 to 20 miles from said weather reporting station in a southeasterly direction.

8. The train in question, consisting of two locomotive units, twelve loaded cars, twenty empty cars, and a caboose, departed Salt Lake City, Utah, at approximately 6:00 o'clock p.m., on October 31, 1972, en route to Provo, Utah.

9. The train arrived at Intermountain Farmers Association's facility at Draper, Utah, shortly before 7:00 o'clock p.m., and was stopped on the main line track adjacent to defendant's facility headed generally in an eastbound compass direction.

10. Immediately to the north of the Leased Premises, were three sets of railroad tracks as shown in the print marked Exhibit "K", and by this reference made a part hereof. The trackage immediately north of defendant's facility is identified as the "Poultry Track", the center track is identified as the "Main Line Track", and the track to the north of the Leased Premises is identified as the "Passing Track". The area north of defendant's facility and north of where the tracks are located is fenced by the land owner on the north, said fence running east and west. See three photographs taken September 26, 1975, and marked Exhibit "Q", attached hereto, and by this reference made a part hereof. The area north of the fence referred to as depicted in these photographs, is not owned by or leased by Intermountain Farmers.

11. The two locomotive units (3645-A and 137-B) were detached from the balance of the train remaining on the main line trackage, pulled forward beyond the switch into the poultry track, and subsequently backed in a westerly direction along

the poultry track adjacent to the Intermountain Farmers Association's facility.

12. At the time of this backward movement along the poultry track, the engineer, an employee of plaintiff, was operating the two locomotive units from the east locomotive (3645-A) seated at the controls located on the south side of the east locomotive cab.

13. The brakeman, Levi Ki Tua'one, an employee of plaintiff, was riding the west locomotive (137-B), on the southwest corner thereof. He was a student brakeman and this was his third road trip out of the yard.

14. The lead or west locomotive unit identified as 137-B which entered the poultry track first had two headlights operating at the time to illuminate the track and right of way. These headlights, located one above the other on the horizontal center line of the locomotive, approximately 12 feet 5 inches above the rail, were seven inches in diameter and produced a total beam candle power of 600,000 units. The brakeman claims there was plenty of light to see the tracks as they were backing. He said he had no trouble seeing where he was going. (Deposition of Tua'one, pages 9 and 34).

15. The purpose of the westerly inbound movement was to pick up two empty but separated boxcars located on the poultry track serving the defendant. These two boxcars (UP 165227 and LN 12470) at the time of the inbound move were located over the bare spots in the snow depicted in Exhibit "D".

16. During the westerly inbound move on the poultry track, the southwest steps of unit 137-B upon which the brakeman was riding at the time, must have passed by or over the spool of cable; however, the brakeman claims he did not observe the spool of cable. He says he was maintaining a lookout and did not see any obstruction or obstacle to the movement of the train.

17. Plaintiff's employees claim they were performing their duties for the railroad company in the customary and routine manner under the circumstances. The railroad company procedure is such that before backing a train, the track must be free from obstruction to train movement and the track must either be seen during the movement or known to be clear. (Richins' Deposition, page 53).

18. During the west bound movement on the poultry track, Conductor Richins, who had been riding the caboose from Salt Lake City to Draper, had dismounted from the caboose and had walked easterly between the main line track and the poultry track to assist in the switching operation being conducted on the poultry track. (Second Deposition of Richins, pages 22 and 23).

19. Mr. Richins stated in his deposition,

"Q. Did you know when you left the yard to go south that he was a new man -- A. Yes.

Q. -- a new brakeman? A. Yes. This is why I was going up to help.

Q. Had he been an experienced brakeman would you have left the caboose that night? A. I'd have left the caboose but chances are I wouldn't have concentrated so much on the work that was at hand. I would have -- there are other duties that I have that I could have been doing.

Q. You would have allowed him -- if he had been an experienced brakeman you would have allowed him to do the connecting himself?

A. That's right.

Q. You wouldn't have assisted in doing that necessarily unless he asked? A. Unless I happened to be there. If I had arrived there at a time when I could assist I'd assist, but in inspecting the train,

when I walk up, instead of concentrating so much on getting up there helping him, I would have spent more time looking the train over." (Second Deposition of Richins, pages 22 and 23).

20. After the two locomotives reached the first car on the poultry track, identified as UP 165227, the brakeman made the connection between the two locomotives and said car.

21. Conductor Richins, who by this time had arrived at the west car on the poultry track (LN 12470), transmitted instructions to the engineer by walkie-talkie radio which he was carrying to facilitate the coupling between UP 165227 and LN 12470. The track where the switching was being conducted was curved in such a manner that the engineer could not see to the rear of the train and visually receive signals from the brakeman or conductor, so the conductor was transmitting signals by radio in the customary and authorized manner under such circumstances.

22. After the coupling had been completed and the brake airlines charged, Conductor Richins advised the engineer by walkie-talkie radio to commence the eastbound movement in order to return to the main line trackage and the balance of the train.

23. As the movement commenced, Conductor Richins and the brakeman simultaneously stepped aboard the southwest corner of trailing locomotive 137-B. Richins testified that he would not have mounted the train as it moved out to the main line but would have walked over to the caboose if it hadn't been for the rubbish, slimy dust, bran dust or grain on the ground in the area. (See Richins' deposition, page 28, lines 1-5; page 34, lines 6-11; page 35, lines 5-13, 22-25; and page 36, lines 1-2).

24. The brakeman claims he had both of his feet located on the bottom step of trailing locomotive 137-B, as

depicted in the photograph marked Exhibit "L", and Conductor Richins claims he had his right foot on the bottom step and left foot on the foot board, as depicted in said Exhibit "L". Richins said both men were crowding onto the same area but that such a situation was not abnormal or unusual with a student brakeman. (Second Deposition of Richins, page 18).

25. After the movement had obtained the speed of approximately three to five miles per hour and had moved approximately two boxcar lengths, Conductor Richins claims he was knocked off the moving train by the spool of cable owned by the defendant and depicted in Exhibits "E", "F", "G", "H", and "I", precipitating the injuries sustained.

26. At the time of the accident, Conductor Richins was riding the train movement on the south side of the poultry track next to the Intermountain Farmers Association's facility, under lease to the defendant. The spool of one-half inch steel cable, as depicted in the photographs marked Exhibits "E", "F", "G", "H", and "I", at the time of the accident was located within eight (8) feet six (6) inches from the center line of the poultry track immediately adjacent to the Leased Premises.

27. Neither plaintiff nor any of its employees, agents, servants, etc., claims to have been aware of or to have observed the subject spool of cable at anytime prior to the accident.

28. After the accident, the spool of cable owned by defendant was observed to be located approximately one foot south of the south rail of the poultry track in the location shown in the photographs marked Exhibits "E", "F", "G", "H", and "I". The distance between the rails of the poultry track was four (4) feet eight and one-half (8½) inches.

29. Defendant claims to have last seen the spool of cable located right next to its building immediately south of the poultry track where the accident occurred. At about 11:00

o'clock a.m. on the day prior to the accident, an employee of defendant, Robert W. Turley, its plant manager, made an inspection of the building, by walking along the same. Such inspections were made approximately once a week. (Turley deposition, pages 5, 8, 9, 10, 11, 14, 15, 36 and 37). Turley saw no spool of cable in the track area, nor had he ever seen this spool prior to the accident. (Turley Deposition, pages 14, 15 and 37).

30. Defendant's employees disclaim having any knowlege as to how the spool of cable got to its location at or near the track on the night of the accident. The night of the accident in question was Halloween night.

31. The dimensions of the spool were approximately one (1) foot in height by two (2) feet four (4) inches in length. Attached to the spool was some one-half inch (½) steel cable. The defendant claims it never used the spool and cable.

32. By letter, dated December 15, 1972, plaintiff advised defendant in writing of the subject accident, expressed the opinion that legal action was apparent, and provided defendant full opportunity to defend or participate in the disposition thereof. (A copy of said letter, marked Exhibit "M" is attached hereto).

33. On or about January 29, 1973, said Richard V. Richins filed an action alleging negligent conduct against the Railroad, in the Third Judicial District Court of Salt Lake County, State of Utah, entitled "Richard V. Richins vs. Union Pacific Railroad Company", identified as Civil Number 210084, demanding judgment for injuries sustained in the above-described accident in the sum of $750,000.00; such action was brought under and by virtue of the provisions of the Federal Employers' Liability Act, 45 U.S.C.A. Section 51, et seq.

34. On February 21, 1973, the Railroad notified Intermountain Farmers in writing of the pendency of such action

and again provided Intermountain Farmers full opportunity to defend the Railroad or participate in the defense against Richins' lawsuit. A copy of said notification is attached hereto marked Exhibit "N", and by this reference made a part hereof. By letter, dated March 22, 1973, Intermountain Farmers declined to accept tender of the case.

35. By a hand-delivered letter, dated and delivered October 24, 1973, the Railroad advised Intermountain Farmers that, following extensive settlement negotiations with Richard V. Richins' legal counsel, the Railroad had agreed to compromise Mr. Richins' case for $162,500.00. In said letter, the Railroad requested that Intermountain Farmers be prepared to tender the compromise payment of $162,500.00 to Mr. Richins at the settlement conference scheduled for October 31, 1973. A copy of said letter is attached hereto as Exhibit "O", and by this reference made a part hereof.

36. On October 31, 1973, the Railroad, by way of compromise and in order to settle Mr. Richins' action and secure a release, paid to said Richard V. Richins the sum of $162,500.00. Intermountain Farmers' name was included in the Release, but not by its request. A copy of said Release is attached hereto as Exhibit "P", and by this reference made a part hereof.

37. At all times mentioned herein, Intermountain Farmers rejected the tender of defense of the claim and suit brought by Mr. Richins and rejected any and all offers of the Railroad to enter into negotiations and/or settlement of Richins' suit.

38. On or about November 15, 1973, the Railroad instituted this action to recover from the Intermountain Farmers said $162,500.00, together with defense costs and expenses in the sum of $1,195.00, reasonable attorneys' fees in the sum of $1,840.00, and depositions expenses of $97.50, for a total sum of $165,632.50.

39. Under the provisions of the Federal Employers' Liability Act herein referred to, a jury issue was presented as to whether or not the Railroad was negligent and would have been held legally liable to Richard V. Richins for the injuries he sustained as described above, and the Railroad could have been held legally liable by a jury or court for such injuries sustained.

40. It is agreed by the parties that the settlement made by the Railroad with Conductor Richins in his lawsuit under the provisions of said Federal Employers' Liability Act is deemed reasonable in all respects, including all costs and attorneys' fees.

41. The respective parties further stipulate that all depositions taken in this action may be published and used by the Court for the purpose of making its decision herein.

GENERAL NATURE OF THE CLAIMS OF THE RESPECTIVE PARTIES

A. Plaintiff contends that it is entitled to indemnification under one or more of the following theories:

1. Full indemnity under either contractural indemnity and/or implied indemnity;
2. Contribution under Section 78-27-39, U.C.A, 1953 (Supp. 1973);
3. Application of the doctrine of res ipsa loquitur.

B. Defendant contends:

1. There is no indemnity, either contractural or implied, from defendant to plaintiff for the injuries to Richins;
2. At the time of the accident and injuries to Richins, there was no right of contribution between joint tort feasors. If defendant herein is determined to be a tort feasor,

which it denies, Title 78-27-39, U.C.A 1953, (Supp. 1973) has no application as it was passed by the Legislature and became law subsequent to the accident involving Richins;

3. Denies the application of the doctrine of res ipsa loquitur.

The foregoing Stipulation is hereby agreed to and entered into this 7th day of April, 1976.

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